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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
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12 JOHN EARL CAMPBELL,

13 Plaintiff,

14 v.

15 NATIONAL PASSENGER RAILROAD  
16 CORPORATION dba AMTRAK, JOE  
DEELY, and DOES 1-15, inclusive,

17 Defendants.  
18

) NO. C05-5434 MJJ (EDL)  
)  
)

**PLAINTIFF'S NOTICE OF MOTION AND  
MOTION TO COMPEL DISCOVERY**

) DATE: May 8, 2007  
) TIME: 9:00 a.m.  
) DEPT.: Courtroom E, 15<sup>th</sup> Floor  
)

) HON. JUDGE ELIZABETH D. LAPORTE  
)

) DISCOVERY CUT-OFF: March 23, 2007  
)

) TRIAL DATE: July 23, 2007  
)

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21 **DISCOVERY MATTER**  
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1 that he needs to prepare for trial. The documents that MR. CAMPBELL seeks are directly  
2 relevant to the issues in dispute and reasonably calculated to lead to the discovery of admissible  
3 evidence at trial. Finally, MR. CAMPBELL has no other way of obtaining this evidence.

#### 4 SUMMARY OF FACTS

5 MR. CAMPBELL began his work on the railroad at Southern Pacific Railroad in  
6 May 1984. He worked for Southern Pacific for eight (8) years as a Machine Operator. This job  
7 involved maintenance and repair of the tracks, including those caused by derailments. As a  
8 Machine Operator, he also maintained and repaired railroad right of ways and operated heavy  
9 track machinery. MR. CAMPBELL became very knowledgeable of railroad operations, learning  
10 virtually all of the rules of the railroad trade. He was well prepared for his work with Defendant  
11 AMTRAK.

12 MR. CAMPBELL was employed by Defendant AMTRAK from November 1998  
13 to September 17, 2004. During his employment with AMTRAK, he applied for promotion to the  
14 position of Engineer six (6) times. Each time his application was rejected and lesser qualified,  
15 less senior Caucasian applicants were promoted to the position.

16 In June 1999, MR. CAMPBELL applied for the Engineer position for the first  
17 time. His application was rejected on the grounds that he was not eligible to apply based on the  
18 length of his employment with AMTRAK. In 2000 and 2001, MR. CAMPBELL applied again,  
19 and was interviewed for the Engineer position, but other applicants with less seniority than he  
20 were selected. In 2002, his scheduled interview was cancelled. MR. CAMPBELL was never  
21 given a reason why.

22 In November 2003, MR. CAMPBELL applied for the Engineer position for the  
23 fifth time.<sup>1/</sup> Interviews were held in December 2003, but he was not scheduled for an interview,  
24 even though he was qualified for the position. In January 2004, MR. CAMPBELL learned that  
25 two less qualified Caucasian applicants with less seniority were selected for the position.

26 On January 28, 2004, MR. CAMPBELL filed a Charge of Discrimination with the  
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28 <sup>1</sup> This is the first discriminatory promotion that fall within the statute of limitations.

1 California Department of Fair Employment & Housing (DFEH) and the United States Equal  
2 Employment Opportunity Commission (EEOC), challenging his non-selection for the Engineer  
3 position and asserting that Defendant AMTRAK discriminated against African-Americans on the  
4 basis of race in promoting applicants to the Engineer position.

5 In June 2004, while his charge of discrimination was pending, MR. CAMPBELL  
6 applied for the Engineer position for the sixth time.<sup>2/</sup> There were seven (7) positions available in  
7 Oakland and Sacramento. MR. CAMPBELL was willing and able to take any one of these  
8 positions. He was interviewed on July 7, 2004 by a panel which included the Vice Local  
9 Chairman of the BLET Division 144-Amtrak for Oakland Sacramento, Chad M. Skinner. Mr.  
10 Skinner reported to MR. CAMPBELL that:

11 “Your interview was very enlightening and in my opinion  
12 ranked among the best. Your overall score ranked among  
13 the highest of all the applicants we interviewed over the  
14 three-day period. It is unknown to the Organization why  
15 you were not selected however, it was later discovered the  
16 Mr. Patrick Preusser had a meeting with Susan Venturelli  
17 (HR) on Monday, July 11, 2004 to discuss the potential  
18 candidates that were to be selected. The Organization was  
19 never informed of this meeting nor asked to participate in  
20 any capacity despite our contractual right to partake.”  
21 (Exhibit A to the Declaration of Pamela Y. Price  
22 (hereinafter “Price DEN”).)

23 In August 2004, seven (7) Caucasian applicants with less seniority were selected  
24 for the positions. MR. CAMPBELL was not promoted or given any reason for his non-selection.

25 On or about August 6, 2004, MR. CAMPBELL was accused of violating  
26 Defendant AMTRAK’s Operating Rules. He was accused of failing to properly secure the brakes  
27 on a locomotive inside the Oakland Yard prior to coupling it on July 24, 2004. An internal  
28 hearing was held on September 9, 2004, and Defendant AMTRAK’s Hearing Officer sustained  
four (4) of the five (5) charges against MR. CAMPBELL. On September 17, 2004, Defendant  
AMTRAK’s District Superintendent for the Pacific Division-Bay District, Steve Shelton,

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<sup>2</sup> This is the second discriminatory promotion that falls within the statute of limitations.

1 terminated MR. CAMPBELL's employment, ostensibly for these rules violations.<sup>3/</sup>

2 MR. CAMPBELL's union vehemently objected to this termination, stating that:  
3 "the discipline was harsh, excessive and not consistent with discipline assessed in similar cases,  
4 not just on Amtrak, but in the entire industry."<sup>4/</sup> MR. CAMPBELL contends that a violation of  
5 these work rules did not usually result in termination, and that his termination is excessive and  
6 inconsistent with discipline assessed in similar cases. He intends to prove that he was fired in  
7 September 2004 in retaliation for his complaints to DFEH and EEOC in February 2004.

8  
9 **I. MR. CAMPBELL IS ENTITLED TO FURTHER RESPONSES  
TO HIS REQUEST FOR PRODUCTION OF DOCUMENTS**

10 Non-expert discovery cut-off was initially set by this Court for **February 16, 2007**.  
11 On February 9, 2007, the parties submitted a stipulation and proposed order to enlarge the time for  
12 non-expert discovery up to and including March 23, 2007. The Court filed an order approving the  
13 stipulation on February 14, 2007. MR. CAMPBELL served his Third Request for Production of  
14 Documents on February 21, 2007.

15 Pursuant to Federal Rule of Civil Procedure 26(b)(1), parties may obtain discovery  
16 regarding any matter, not privileged, that is relevant to the claim or defense of any party, including  
17 the existence, description, nature, custody, and location of any books, documents, or other tangible  
18 things and the identity and location of persons having knowledge of any discoverable matter. It is  
19 customary for responses to include the identity of the responding party; the identity of the  
20 propounding party and the set number to which the response pertains. (The Rutter Group,  
21 *California Practice Guide, Federal Civil Procedure Before Trial*, § 11-229.)

22 Rule 34(a) allows parties to request documents and things within the scope of  
23 Rule 26(b) and within the possession, custody or control of the party upon whom the request is

24  
25 <sup>3</sup> For the past five (5) years, MR. CAMPBELL switched in the same manner and  
26 employed the same safety practices as every other crew that switched in that territory. The record  
27 reveals that the physical characteristic of the territory is flat and supports the fact that there was no  
28 accident, no derailment, no damage and no train delay.

<sup>4</sup> See Organization Member's Dissent To Award No.120 Of Public Law Board No. 6478.  
(Exhibit B to Price DEN.)

served. The rule mandates that the response will state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection will be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. (*See E. & J. Gallo Winery v. Cantine Rallo, S. P. A.*, 2006 WL 2583672 (E.D.Cal. 2006).)

**A. Defendant Amtrak's Boilerplate Objections Lack Merit**

Defendant AMTRAK provided a litany of general objections. Such objections will not alone constitute a successful objection, nor will a general objection fulfill the objecting party's burden to explain its objections. (*Ramirez v. County of Los Angeles*, 231 F.R.D. 407, 409 (C.D.Cal. 2005).) General objections are not sufficient to raise any substantial, meaningful or enforceable objections to any particular discovery request. (*In re Air Crash at Taipei, Taiwan*, 211 F.R.D. 374, 376 (C.D.Cal. 2002); *Walker v. Lakewood Condominium Owners Association*, 186 F.R.D. 584, 587 (C.D.Cal. 1999); *Taylor v. Los Angeles Police Department*, 1999 WL 33101661 (C.D.Cal. 1999).) In addition to its general objections, Defendant AMTRAK asserted the following five objections, in various combinations, to each of MR. CAMPBELL's requests:

- (1) overbroad, compound and unduly burdensome
- (2) seeking information neither relevant to the claim or defense of any party, nor reasonably calculated to lead to the discovery of admissible evidence
- (3) seeks materials protected from disclosure the California Constitutional right of privacy and/or the federally recognized right to privacy
- (4) seeks information protected from disclosure by either the attorney-client privilege or the attorney work product doctrine

**B. Defendant Amtrak's Privacy Objections Are Outweighed by Mr. Campbell's Right to Discovery**

Defendant AMTRAK makes a laundry list of objections to Requests Nos. 17-29,

1 including relevancy, overbroad, that the requests are unduly burdensome and privacy. Since one of  
 2 MR. CAMPBELL's claims against Defendant AMTRAK is failure to promote based on racial  
 3 discrimination, his requests are clear and directly relevant and narrowly tailored to lead to further  
 4 discoverable information. Additionally, Defendant AMTRAK presumably keeps employment  
 5 records and records pertaining to applications and promotions because in its response to several of  
 6 the Requests, Defendant AMTRAK agreed to produce these documents on a limited basis.

7 "In recent years, the courts have **routinely ordered** the production of personnel files  
 8 of third parties in employment discrimination and police brutality cases." (*Ceramic Corp. of*  
 9 *America v. Inka Maritime Corp.*, 163 F.R.D. 584, 589 (C.D.Cal 1995) (emphasis added); *see also*,  
 10 *Garrett v. City and County of San Francisco*, 818 F.2d 515, 1519 n. 6 (9<sup>th</sup> Cir. 1987) (privilege  
 11 claims grounded in state law will be disregarded when the discovery sought includes personnel files  
 12 in federal question cases, including Title VII actions); *Jones v. Commander*, 147 F.R.D. 248 (1993)  
 13 (court ordered production of evaluation reports of a nonparty supervisor both during and outside the  
 14 period that the plaintiff was supervised); *E.E.O.C. v. University of New Mexico*, 504 F.2d 1296  
 15 (10<sup>th</sup> Cir. 1974) (personnel files for all faculty members were deemed discoverable in a failure to  
 16 promote case); *Orbovich v. Macalester College*, 119 F.R.D. 411 (D.Minn. 1988) (tenure and  
 17 personnel files of third parties were ordered to be produced in a denial of tenure case); *United States*  
 18 *v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3<sup>rd</sup> Cir. 1980) (medical information contained within  
 19 nonparty employees' personnel files was discoverable in an action brought under OSHA); and  
 20 *Weahkee v. Norton*, 621 F.2d 1080 (10<sup>th</sup> Cir. 1980) (Nonparty employees' files were discoverable in  
 21 a discrimination case).)

22 MR. CAMPBELL's right to civil discovery outweighs these employees' rights to  
 23 privacy. (*Narayan v. EGL, Inc., et al.* (N.D.Cal. 2006) 2206 WL 3507918 citing *Harris v. Superior*  
 24 *Court* (1992) 3 Cal.App.4th 661, 664, 4 Cal.Rptr.2d 564, "one's constitutional right of privacy is  
 25 not absolute and, upon a showing of some compelling public interest, the right of privacy must give  
 26 way".) Access to confidential personnel information is widely recognized as necessary in order to  
 27 adequately protect rights of individuals through litigation. (*See e.g., University of Penn. v. EEOC*  
 28 (1990) 493 U.S. 182, 110 S.Ct. 577.)



1 **C. Defendant Amtrak Should Not Be Allowed to Hide**  
 2 **Evidence of Its Discriminatory Hiring Practices**

3 It has long been held that a defendant's hiring and termination practices may be used  
 4 to prove intentional discrimination. Indeed, in this District, discovery of this nature is routinely  
 5 allowed. (*See Stender v. Lucky's Stores*, 803 F.Supp. 259, 331-332 (N.D.Cal. 1992); *Estes v. Dick*  
 6 *Smith Ford, Inc.*, 856 F.2d 1097 (8<sup>th</sup> Cir. 1988).) Request Nos. 22 through 28 sought certain  
 7 documents reflecting the racial composition of Defendant AMTRAK's workforce in the Pacific  
 8 Division. This information can be used to demonstrate the context and the environment in which  
 9 MR. CAMPBELL was employed, and AMTRAK's hiring and termination practices. Indeed, in his  
 10 EEO complaint, MR. CAMPBELL asserted that Defendant AMTRAK had a history and pattern of  
 11 refusing to promote African-Americans to the position of Engineer. This evidence is critical to  
 12 prove the truthfulness of this assertion.

13 **D. Evidence of Similarly-Situated Employees Who Committed**  
 14 **Similar or More Serious Offenses Without Being Terminated Is**  
 15 **Relevant to Mr. Campbell's Discrimination and Retaliation**  
 16 **Claims**

17 As noted earlier, access to confidential personnel information is widely recognized as  
 18 necessary in order to adequately protect rights of individuals through litigation. (*See e.g.*,  
 19 *University of Penn. v. EEOC* (1990) 493 U.S. 182, 110 S.Ct. 577.) MR. CAMPBELL can establish  
 20 a *prima facie* case of racial discrimination by showing (1) that he is a member of a protected class  
 21 (African-American); (2) he was qualified for his position; (3) Amtrak disciplined and terminated  
 22 him; and (4) Amtrak did not discipline or terminate similarly-situated non-African-American  
 23 employees who violated the same or similar work rules. (*McDonald v. Santa Fe Trail*  
 24 *Transportation*, 427 U.S. 273, 96 S.Ct. 2574 (1976); *Green v. Armstrong Rubber*, 612 F.2d 967 (5<sup>th</sup>  
 25 Cir. 1980); *Turner v. Texas Instruments*, 555 F.2d 1251 (5<sup>th</sup> Cir. 1977); *Garrett v. City & County of*  
 26 *San Francisco*, 818 F.2d 1515 (9<sup>th</sup> Cir. 1987).)

27 In this discrimination case, it is critical that MR. CAMPBELL be granted access to  
 28 information regarding Amtrak's treatment of other similarly-situated employees who were involved  
 in derailments, a far more serious offense than the event for which Mr. Campbell was terminated.  
 Evidence regarding the treatment of similarly-situated employees is clearly relevant and admissible



1 to establish disparity in treatment. Amtrak's refusal to provide basic information relating to its  
 2 treatment of incidents of derailments was clearly done to needlessly increase the cost of discovery to  
 3 MR. CAMPBELL.

4 Defendant AMTRAK's blanket, boilerplate objections to each of MR.  
 5 CAMPBELL's requests lack merit. As a result, the Court should compel Defendant AMTRAK to  
 6 provide a further response to the Request for Production and produce documents responsive to each  
 7 of the requests.

8 **II. MR. CAMPBELL IS ENTITLED TO EVIDENCE OF**  
 9 **DEFENDANT DEELY'S FINANCIAL CONDITION**

10 MR. CAMPBELL also seeks evidence regarding the financial condition of  
 11 Defendant JOE DEELY.<sup>5/</sup> Defendant AMTRAK argues that the California Constitution, Article I,  
 12 Section 1, provides a privacy right that protects it from producing financial information. The  
 13 standard, however, for the disclosure of financial information in Federal Court does not include the  
 14 privacy safeguards set forth under the California Constitution. Instead, claims of privilege arising in  
 15 the course of the adjudication of federal rights are governed by principles of federal common law  
 16 and not state law. (*United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2719, 2625, 105 L.Ed.2d 469  
 17 (1969), citing Rule 501 of the Federal Rules of Evidence; *see also Kelly v. City of San Jose*, 114  
 18 F.R.D. 653, 656 (N.D.Cal. 1987).)

19 Further, State privacy statutes do not control discovery in federal court: "[w]hile this  
 20 Court may give some weight to privacy rights protected by state statutes, the 'ultimate responsibility  
 21 for deciding how much weight to ascribe such interests, and how that weight compares with the  
 22 significance of competing interests must reside with the federal courts.'" (*See Welsh v. City and*  
 23 *County of San Francisco*, 887 F.Supp. 1293, 1301 (N.D.Cal. 1995), citing *Kelly v. City of San Jose*,  
 24 114 F.R.D. *supra* at 656.)

25  
 26 <sup>5/</sup> As set forth in the Declaration of Pamela Y. Price in Support of the instant Motion,  
 27 Defendant Deely's financial information has already been ordered to be disclosed to Plaintiff's  
 28 counsel in another unrelated action where Defendant Deely is represented by the same counsel.  
 (See Attachment 4 to the Price Declaration.) Defense counsel in this action refused to stipulate to  
 the protective order negotiated by her firm in the other case.

1 Further, the Federal Rules require specific claims as to privilege and do not allow for  
2 generalized privacy concerns offered without legal basis. Federal Rule 26(b)(5) requires:

3 When a party withholds information otherwise discoverable  
4 under these rules by claiming that it is privileged or subject to  
5 protection as trial preparation material, the party shall make  
6 the claim expressly and shall describe the nature of the  
7 documents, communications, or things not produced or  
8 disclosed in a manner that, without revealing information  
9 itself privileged or protected, will enable other parties to  
10 assess the applicability of the privilege or protection.

11 MR. CAMPBELL bears the burden of proving Defendant DEELY's net worth as a  
12 prerequisite to a punitive damages award. Financial information is relevant to punitive damages  
13 claims and is discoverable under the Federal Rules of Civil Procedure, whether or not such evidence  
14 would be admissible at trial. (See *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 286 (C.D.Cal.  
15 1998).) The Federal Rules of Civil Procedure encourage courts to compel production of financial  
16 information during the discovery period because "one of the purposes behind the broad federal  
17 discovery rules is to facilitate settlement, and such financial information is valuable in assisting both  
18 sides in making a realistic appraisal of the case, and may lead to settlement and avoid protracted  
19 litigation." (See *Oakes, supra* at 286, citing *CEH, Inc. v. FV "Seafarer,"* 153 F.R.D. 491, 498-99  
20 (D.R.I. 1994).)

21 MR. CAMPBELL needs the requested information to meet his burden of  
22 demonstrating Defendant Deely's net worth for purposes of assessing punitive damages. (See, e.g.,  
23 Ninth Circuit Model Civil Jury Instruction No. 7.5 *Punitive Damages* (plaintiff bears burden of  
24 establishing amount of punitive damages that should be assessed; instruction notes contemplate  
25 evidence of defendant's net worth being offered by plaintiff); see also *Adams v. Murakami*, 54  
26 Cal.3d 105, 284 Cal. Rptr. 318 (1991) (under California law Plaintiff bears the burden of proving  
27 financial worth).) Moreover, evidence of net worth "is crucial to the issue of punitive damages. "  
28 (See *Oakes*, 179 F.R.D. *supra* at 284; see also *U.S. v. Bonanno Organized Crime Family of La Cosa*  
*Nostra*, 119 F.R.D. 625, 627 (E.D.N.Y. 1988) ("the party resisting disclosure should bear the  
burden of establishing alternative sources for the information").)

### CONCLUSION

Defendant AMTRAK should be compelled to supplement its responses to Request

1 Nos. 17 through 29, and produce the requested documents within ten (10) days from the date of the  
2 Order. Moreover, Defendant AMTRAK should be compelled to produce Defendant Deely for  
3 deposition to respond to questions regarding his financial condition forthwith.<sup>6/</sup> If Defendant  
4 AMTRAK is not compelled to provide the requested information, MR. CAMPBELL will face  
5 prejudice and be at a disadvantage in preparing for trial.

6 Dated: April 3, 2007

PRICE AND ASSOCIATES

7  
8 /s/ Pamela Y. Price  
PAMELA Y. PRICE Attorneys for Plaintiff  
9 JOHN CAMPBELL  
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27 <sup>6/</sup> If a deponent, (party or non-party) refuses to answer a question at a deposition, the deposing  
28 party's remedy is to bring a motion to compel answers. (*Estrada v. Rowland*, 69 F.3d 405, 406 (9<sup>th</sup>  
Cir. 1995).